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VIA E-MAIL AND U.S. MAIL

Mr. Fred Harris, Staff Counsel
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
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Re: Second Revised Draft Resolution L-436: Joint Comments of San Diego Gas & Electric Company and Southern California Gas Company

Dear Mr. Harris:

Pursuant to Rule 14.5 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission") and the December 19, 2012 letter approving multiple parties' request for an extension to file comments, the San Diego Gas & Electric Company ("SDG&E") and Southern California Gas Company ("SoCalGas") respectfully submit the following Joint Comments on the Second Revised Draft Resolution L-436 Adopting New Regulations Regarding Public Access to Records of the California Public Utilities Commission and Requests for Confidential Treatment of Records, which includes a second revised draft General Order 66-D ("Second Revised Draft G.O. 66-D") and other draft forms (collectively "the Second Revised Draft Resolution").

SDG&E and SoCalGas continue to support the Commission's goal of improving public access to public records subject to disclosure under the California Public Records Act ("PRA"),¹ and appreciate the effort that Commission Staff has expended revising the previous draft resolutions based on various parties' prior comments.

Unfortunately, these considerable revisions have made the Second Revised Draft Resolution simultaneously too long-winded and too underdeveloped to put before the Commission for consideration. While the sheer length and density of the Second Revised Draft Resolution

¹ Cal. Gov. Code §6250 *et seq.*

preclude SDG&E and SoCalGas from providing meaningful comments on every new proposal and legal error contained therein, some initial comments are provided below. First, the Second Revised Draft Resolution has become too cumbersome and must be broken into smaller, discrete issues for parties' consideration. Second, the Second Revised Draft Resolution is based on a fundamentally flawed reading of Pub. Util. Code §583, which must be corrected. Third, the newly proposed processes are flawed for several reasons, including the fact that they unfairly shift the Commission's responsibilities onto regulated utilities. Fourth, discussions of confidential treatment provided by statute and legal privileges are legally flawed. Finally, the Second Revised Draft Resolution continues to ignore procedural issues previously raised by SDG&E and SoCalGas. SDG&E and SoCalGas encourage Staff and all interested parties to discuss these numerous issues in future workshops or through focused comments. In the meantime, based on the multiple legal deficiencies and undeveloped processes proposed in the Second Revised Draft Resolution, SDG&E and SoCalGas strongly suggest that the Second Revised Draft Resolution be held in abeyance until all workshops and briefings have concluded, or that the Second Revised Draft Resolution be completely withdrawn.

I. THE SECOND REVISED DRAFT RESOLUTION MUST BE BROKEN INTO DISCRETE AND MANAGEABLE TOPICS FOR FUTURE WORKSHOPS OR BRIEFINGS PRIOR TO ANY VOTE

The Second Revised Draft Resolution is a major revision of the previous Draft Resolution last circulated in July 2012. The Second Revised Draft Resolution now stretches almost 200 pages, covers numerous topics and proposes several new administrative processes. Many of these topics and proposals include new legal arguments that Staff has spent six months drafting, which are too complicated for interested parties to adequately analyze and respond to in the short comment period provided. Simply put, the Second Revised Draft Resolution has become too complicated and complex to revise through a single round of comments before it is put before the Commissioners on January 24, 2013 for consideration.

Instead of trying to tackle a wide variety of issues and create new processes in a single resolution, SDG&E and SoCalGas recommend that this informal process be approached methodically, in stages.² The Second Revised Draft Resolution should be broken into manageable discussion areas by topic – e.g., Commission safety-related records, responses to PRA requests, new subject matter matrices, the document submittal process, and G.O. 66-C revisions. Breaking the Second Revised Draft Resolution into shorter, focused draft resolutions would allow interested parties to properly and thoroughly discuss each topic and develop topic-specific draft resolutions for the Commissioners' consideration. As such, the Second Revised Draft Resolution should only be used as a "starting point" for future discussions and workshops, and should not be considered to be a resolution nearing completion.

² SDG&E and SoCalGas are ambivalent about whether each topic is addressed through an informal process, like this one, or through a formal rulemaking. However, if Staff continues to address these issues through informal processes, SDG&E and SoCalGas beseech Staff to narrow the service list and resolve continuing service list issues so that all parties receive adequate notice and are able to participate fully in the process.

Therefore, SDG&E and SoCalGas propose that the Second Revised Draft Resolution be withdrawn from the Commission's January 24, 2013 meeting notice and all future voting meetings. Instead, the Commission should first address the issues it has identified as "most pressing" – the release of Commission safety records, Commission inspection reports, and previously-identified utility reports – in a separate draft resolution.³ These issues have been thoroughly discussed by the interested parties and are not contested.⁴

Contrary to the Second Revised Draft Resolution, however, this draft resolution should only address safety records and safety investigations originated by the Commission and not address the safety records generated by related utilities, except for those eleven types previously identified.⁵ The Second Revised Draft Resolution asserts that there is no "distinction" between "CPUC safety-related reports and utility safety-related reports."⁶ Such an assertion is naïve and incorrect. Utility safety-related reports often contain information that is confidential, proprietary, privileged, or private, and therefore, must be dealt with accordingly. Therefore, the Commission should first attend to the distinct issue of Commission-generated safety and inspection records in a draft resolution, and discuss utility-generated safety records later.

Confidential matrices should be developed next so that submitters can start using those matrices even if a revised submittal process is never approved by the Commission. The development of subject-matter matrices will take considerable time and effort by all those involved and in the end, not every subject or industry will receive its own matrix.⁷ The workshops to develop the matrices will likely be attended by the same counsels so the workshops for different matrices should not be held concurrently to conserve parties' resources and staff. Sufficient notice of any scheduled workshops (at least three weeks) must be provided to all interested parties so that the appropriate industry or area experts have sufficient time to prepare and attend the workshops.

In addition, the various subject matter matrices the Second Revised Draft Resolution proposes are too broad. These topics should be broken down into smaller subject areas to focus any comments and workshop discussions. For example, the Second Revised Draft Resolution lumps "security" into the general "safety" topic for workshop discussions. The issue of "security" is far too important and nuanced to include in a general safety workshop.⁸ In addition, defining what constitutes "security information" requiring confidential status will be a very difficult, if not

³ Second Revised Draft Resolution at 2(2), 18-19, COL 2.

⁴ Second Revised Draft Resolution at 7, 14-20.

⁵ Second Revised Draft Resolution at 7. The eleven types of utility-generated safety-related records that the interested parties have generally not objected to making public appear on pages 18-19 and OP 7 of the Second Revised Draft Resolution.

⁶ Second Revised Draft Resolution at 100.

⁷ Recall that the development of the single procurement matrix for D.06-06-066 took more than a year to develop and finalize.

⁸ Second Revised Draft Resolution at 64-68.

impossible task⁹ that will require time and diligence by the interested parties to complete properly, if that is even possible. Participating parties should use the workshops to guide the matrix development process and decide what types of matrices are feasible and appropriate, rather than committing now to the development of several different matrices (i.e., by industry, by company, by subject matter), which may prove to be duplicative, conflicting, or even impossible to create.

II. THE FUNDAMENTAL ASSERTION THAT §583 PRESUMES ALL INFORMATION PROVIDED TO THE COMMISSION IS PUBLIC (ABSENT A REQUEST FOR CONFIDENTIAL TREATMENT) IS INCORRECT AND UNLAWFUL

Staff's fundamental assertion underlying its effort to reform G.O. 66-C is wrong. The Second Revised Draft Resolution states that "Cal. Pub. Util. Code §583 authorizes the CPUC to order that records or information furnished to the CPUC by public utilities are presumed to be public unless at the time the records or information are submitted to the CPUC the utilities requests confidential treatment."¹⁰ No legal support for this statement exists.¹¹ Rather, the plain language of §583 demonstrates that the opposite is true – that records or information furnished to the Commission by public utilities are presumed to not be public except through an order of the Commissioner or Commissioners. Section 583 states:

No information furnished to the commission by a public utility . . . shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding.

The Second Revised Draft Resolution's incorrect interpretation of §583 unlawfully attempts to alter the statute's scope. "[N]o regulation adopted [by an agency] is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."¹² Because the Second Revised Draft Resolution proposes to regulate information provided to the Commission by utilities, it must be consistent with §583, and its interpretation of §583 must not alter the statute's scope. The Second Revised Draft Resolution's interpretation of §583 would unlawfully alter the statute's scope by turning it on its head. Therefore, since the

⁹ Defining security documents worthy of confidential treatment is a very difficult task because the sensitivity of the information is often relative to other publicly available information and is largely dependent on the particular situation. It is also difficult to devise an adequate definition for such a nuanced subject. Like Justice Potter Stewart famously remarked about possible obscenity in a film, "I know it when I see it." *Jacobellis v. Ohio*, [378 U.S. 184](#) (1964) (J. Potter, concurring).

¹⁰ Second Revised Draft Resolution at COL 78.

¹¹ The Second Revised Draft Resolution unconvincingly attempts to justify this statement throughout its text. *See, e.g.*, Second Revised Draft Resolution at 44-49.

¹² Cal. Gov't Code § 11342.2. *See, e.g., Morris v. Williams*, 67 Cal. 2d 733, 748 (1967) ("Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.").

Second Revised Draft Resolution conflicts with the plain language of §583 and unlawfully attempts to alter its meaning, its incorrect assertion and the flawed legal analysis offered in its support must be stricken.¹³

III. THE REVISED PROPOSED PROCESS FOR REQUESTING CONFIDENTIAL TREATMENT REQUIRES FURTHER REFINEMENT

SDG&E and SoCalGas appreciate the considerable effort that has been put into revising the proposed process by which regulated utilities would submit documents to the Commission, Commission Staff and DRA (collectively, “the Commission”) outside of a formal proceeding or advice letter filing. However, the process as proposed requires further refinement to address several issues.

The Second Revised Draft Resolution’s proposed process for approving or denying a request for confidential treatment is complicated and, at times, not thoroughly explained. SDG&E and SoCalGas have depicted the Second Revised Draft Resolution’s proposed process by which regulated utilities would submit their documents to the Commission outside of a formal proceeding or advice letter as Attachment A.

A. The Proposed Process is Unduly Burdensome for Regulated Utilities

The Second Revised Draft Resolution incorporates several new proposals and processes, such as Monthly Reports and utility-specific standard public resolutions. Many of these concepts would impose significant burdens on regulated utilities by essentially mandating that the regulated utilities assume the Commission’s duties and complete the Commission’s work.

Under California law, as soon as a regulated utility (or any party) submits a document to the Commission, that document becomes a “public record” under the PRA and becomes the responsibility of the Commission. The PRA defines “public records” as “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” When the Commission receives a request for a public record under the PRA, it must timely determine if the requested record is in its possession, and if so, determine if the record is disclosable, *i.e.*, not confidential.¹⁴ If the agency publicly discloses public records in its possession that are not disclosable, *i.e.*, confidential, then the agency staffer or officer faces misdemeanor charges under Cal. Publ. Util. Code §583. Thus, the Commission is responsible for knowing what public records are in its possession, and whether they are disclosable.

¹³ See, *e.g.*, Second Revised Draft Resolution at FOF 22 & COL 78.

¹⁴ Cal. Gov. Code §6253(c).

The Second Revised Draft Resolution ambitiously proposes that the Commission Staff create several new database and indexing schemes to track and index the documents in its possession.¹⁵ SDG&E and SoCalGas support the creation of several of these databases and indexes, so long as their creation does not impose an undue burden on regulated utilities.¹⁶

Unfortunately, several of the proposed processes would shift the Commission's responsibility for tracking and indexing public records to the regulated utilities. For example, under Second Revised Draft Resolution, a regulated utility would be required to file a mandatory "Monthly Report" that lists every document it has informally submitted to the Commission, whether it has requested or designed each document as "confidential" or "public", and the status of each confidentiality request.¹⁷ In addition, the regulated utility would have to list all documents it has submitted to the Commission as "confidential" in an advice letter or formal proceeding in an "information only" section. In other words, a regulated utility would be required to index and track virtually every document it provides to the Commission in the mandatory "Monthly Report".

To describe this task as overly burdensome would be an understatement; SDG&E and SoCalGas would require additional internal resources at ratepayers' expense to comply with this requirement for each of the thousands of documents we submit to the Commission every year.

More troubling, however, is how this requirement would unjustly shift the Commission's duties to regulated utilities. Under the PRA and §583, once a document is submitted to the Commission, the Commission becomes responsible for the "public record." These responsibilities include knowing whether the document is in the Commission's possession (i.e., indexing) and whether the document is confidential (i.e., tracking). Imposing the Monthly Report requirement would shift these responsibilities from the Commission onto the regulated utilities. As the Second Revised Draft Resolution explains, the Monthly Report would essentially relieve the Commission's Public Records Office ("PRO") of indexing and tracking documents in the Commission's possession and of drafting its own PRO Resolution.¹⁸

¹⁵ See, e.g., Second Revised Draft Resolution at OP 3 ("CPUC staff shall develop a publicly accessible index or database of requests for confidential treatment of records provided to the CPUC, whether the request for confidentiality is in the form of a motion to file under seal, or in any other format"); OP 4 (CPUC staff will develop a publicly accessible Docket Card system for advice letters that "shall provide a centralized database that will permit tracking of advice letters, protests, responses, associated correspondence, CPUC actions regarding advice letters and the timing of such actions, regardless of the industry division with which they were filed."); and OP 6 ("Staff shall develop a publicly accessible index or database of safety-related records and information in the custody of the CPUC . . .").

¹⁶ For example, SDG&E and SoCalGas support the Second Revised Draft Resolution's proposal to create an online database for advice letters, and filings related to those advice letters. Second Revised Draft Resolution at OP 4. The Commission already has the authority to create such a database and should not need a Commission resolution to proceed with this task. The creation of this database should be the responsibility of the Commission, and not require any assistance from the regulated utilities.

¹⁷ Second Revised Draft G.O. 66-D at sec. 3.1.2.3.

¹⁸ The Second Revised Draft Resolution explains that the PRO would then incorporate the monthly reports by reference into the PRO resolutions to "assist the PRO in the preparation of PRO resolutions". Second Revised Draft Resolution at 97.

“Rather than require our PRO to develop [PRO] resolutions identifying all requests for confidential treatment received during a given period, and their status, we may require regulated entities to submit monthly reports identifying each request for confidential treatment and public and confidential status designation submitted pursuant to G.O. 66-D during a given period.”¹⁹

The Second Revised Draft Resolution fails to provide any reasonable explanation for why the Commission is trying to absolve itself from these responsibilities at the expense of the regulated utilities and their ratepayers. Furthermore, no explanation is provided for why the regulated utilities are in a better position to index and track the Commission’s own public records than the Commission’s own PRO. Therefore, any such efforts to shift the Commission’s responsibilities onto regulated utilities should not be considered.

B. The Proposed Process is Unnecessarily Complicated for Regulated Utilities

The Second Revised Draft Resolution also proposes requirements that would be unnecessarily complicated and superfluous for regulated utilities. For example, the Second Revised Draft Resolution contains several requirements that regulated utilities would have to follow when submitting “public” information to the Commission. First, regulated utilities are strongly encouraged to propose draft public status resolutions.²⁰ The creation of these resolutions will require considerable time and resources for each utility and will likely result in the conflicting treatment of the same types of documents across utilities to the confusion of all parties. Second, when a regulated utility submits a public document to the Commission, it would have to label each document as “public” and state the law or order (if any) requiring the document to be public. Finally, as discussed above, regulated utilities would be required to submit a Monthly Report listing all of the documents informally submitted to the Commission and note whether they were public documents or submitted with a request for confidentiality.

All of these requirements for the submission of public documents are unnecessary. The vast majority of documents that SDG&E and SoCalGas provide to the Commission are public. Unless a public utility (or any party) submits a document labeled “confidential” to the Commission, the document should be treated and assumed to be public. Through this simple approach, public utilities will not have to develop public status resolutions or label the vast majority of the submitted documents as “public.” Finally, they would not have to list the hundreds of submitted public documents in a Monthly Report.

C. The Proposed Process Fails to Address How Requests Beyond Staff’s Authority Would Be Decided

Throughout this informal proceeding, one of the most controversial issues has been preventing Staff from unlawfully exercising its discretion when making a final decision about whether a

¹⁹ Second Revised Draft Resolution at 96-97.

²⁰ Second Revised Draft Resolution at 10.

requested record was disclosable. The Second Revised Draft Resolution and its July 2012 predecessor attempt to address this issue by promising that Staff would be relegated to purely ministerial roles in which it would only be allowed to determine (with the help of very specific directions from the Commission) whether a document requesting confidential treatment fits into a category of documents previously determined to be confidential (or public) in a matrix, statute, general order, decision, resolution or other legal sources.

Not every document submitted to the Commission will fit neatly into one of these pre-ordained categories, however. Situations in which confidential documents would not fall into these specific “black and white” categories include “grey” areas, such as when:

- (1) there is a new document not yet conceived of when the matrix or statute was created;
- (2) a balancing-of-interests test applies, such as official information privilege, Cal. Evid. Code §1040, or private personal information, Cal. Gov. Code §6254(c);
- (3) the document’s confidentiality is nuanced and cannot be defined with detail in a matrix or statutory definition (such as a sensitive security information); or
- (4) the document’s assertion of a legally-recognized privilege must be evaluated without viewing the document at issue (such as the assertion of a trade secret privilege, Cal. Evid. Code §§1060-1061; Cal. Civ. Code §3426.1; and Cal. Pen. Code §499c, or attorney-client privilege, Cal. Evid. Code §954).

According to the Second Revised Draft Resolution, in all of four of these cases, because Staff will not be able to simply match the document to a matrix category or statute, Staff would be required to deny the request for confidential treatment, no matter how deserved the confidential treatment. Thus, the proposed process is faulty and incomplete because it does not address how the Commission would process requests for confidential treatment that Staff is not authorized to handle. SDG&E and SoCalGas propose that in those situations in which Staff cannot legally evaluate a request for confidential treatment or privilege as a result of Staff’s limited ministerial authority, the request be automatically sent to the “confidentiality” ALJ for evaluation.²¹

IV. SECOND REVISED DRAFT RESOLUTION’S DISCUSSIONS OF LEGAL PRIVILEGES AND CONFIDENTIAL TREATMENTS ARE LEGALLY FLAWED

The Second Revised Draft Resolution provides several discussions of various privileges and legal protections under which submitters may claim confidential treatment. Several discussions of particular privileges and protections are legally incorrect, however.

²¹ The Second Revised Draft Resolution alludes to this solution when it suggests that “we have already firmly established the principles that we can . . . refer those matters that cannot be informally resolved to another division, e.g., the ALJ Division.” Second Revised Draft Resolution at 87. SDG&E and SoCalGas respectfully request that the process of referring any request that Staff cannot handle should be automatically sent to an ALJ for a decision be formalized as part of any final confidentiality process.

A. The Official Information Privilege, Cal. Evid. Code §1040, Cannot Be a “Catch-All” Because It Requires a Balancing of Interests

More than once, the Second Revised Draft Resolution suggests that utilities seeking confidential treatment should use the official information privilege, Cal. Evid. Code §1040, as a “catch-all” privilege when no other privilege or confidentiality categories are applicable.²² However, it will be difficult to use the official information privilege in this way because it will require a balancing of interests, a task in which Commission Staff may not engage under the Second Revised Draft G.O. 66-D.²³

Section 1040 defines “official information” as “information acquired in confidence by a public employee during the course of his or her duty and not open, or officially disclosed, to the public prior to the time the privilege is asserted.”²⁴ This privilege may be absolute or conditional. Subsection (b)(1) provides an “absolute privilege” for official information that may not be disclosed because a separate federal or state law prohibits disclosure.²⁵ Subsection (b)(2) of the official information privilege provides a “conditional” official information privilege that requires the existence of: (1) official information, and (2) a need for confidentiality that outweighs the necessity for disclosure in the interests of justice that is not based on the agency’s self-interest as a party in a proceeding.²⁶

The Second Revised Draft Resolution proposes that §1040 be used by regulated utilities and other submitters as a catch-all exception for information that is “truly sensitive” but not protected by a specific legal privilege.²⁷ For example, the Second Revised Draft Resolution suggests that utilities should invoke the protections of §1040 “[w]here the trade secret privilege or other specific statutory limitations”, such as Pub. Util. Code §454.5 for market sensitive information,

²² See Second Revised Draft Resolution at 56 & FOF 66.

²³ See *supra*, section III.C.

²⁴ Cal. Evid. Code §1040.

²⁵ Cal. Evid. Code §1040(b)(1) & FOF 67.

²⁶ Cal. Evid. Code §1040(b)(2) & FOF 68. The balancing test under §1040 is essentially the same test the Commission may employ pursuant to Cal. Gov. Code §6255 when asked to release documents through the PRA:

(a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

²⁷ Second Revised Draft Resolution at 71.

“may be unavailable,”²⁸ when the attorney-client communications privilege under Cal. Evid. Code §954 was waived and is not unavailable.²⁹

The problem with relying on §1040 is that it is insufficient to serve as the catch-all provision as suggested by the Second Revised Draft Resolution. First, the absolute privilege protection under §1040(b)(1) is extremely limited.³⁰ California courts have interpreted the absolute privilege protection to protect information from disclosure only if that information may never be disclosed. As the appellate court explained in *LAUSD*,

[T]o qualify for absolute privilege within the meaning of Evidence Code section 1040, a statute must do more than merely make information confidential or limit its disclosure to the public. Rather, the language or structure of the statute must evince a legislative intent to bar disclosure even in the context of litigation.³¹

In other words, a statute “characterizing information as ‘confidential’ or otherwise limit its public disclosure do not create an absolute privilege within the meaning” of section 1040(b)(1).³² A recent review of California state and federal cases discussing the absolute privilege under §1040(b)(1) demonstrates that a request for absolute privilege is rarely granted, and only in extreme situations.³³

In addition, the absolute privilege protection is duplicative of the PRA exception §6254(k) and the federal or state laws that it relies upon. Therefore, §1040(b)(1) does not provide any new legal protection for confidential documents that they do not already have under federal or state law. For both of these reasons – that the exception is extraordinarily difficult to qualify for and

²⁸ Second Revised Draft Resolution at 71.

²⁹ Second Revised Draft Resolution at 59 (“If a regulated entity provides privileged information to the CPUC in confidence, the information may fall within the Cal. Evid. Code §1040(a) definition of official information. The CPUC may be able to assert that the privileged information is also subject to the CPUC’s official information privilege.”).

³⁰ Second Revised Draft Resolution at 71 at fn.64 & fn.73.

³¹ *Los Angeles Unified School District v. Trustees of the Southern California IBEW-NECA Pension Plan*, 187 Cal.App.4th 621, 630-631 (2010) (“*LAUSD*”).

³² *LAUSD*, 187 Cal.App.4th at 629.

³³ See, e.g., *Richards v. Superior Court of Los Angeles County*, 65 Cal. Rptr. 917 (Cal. App. 1968) (holding that the absolute privilege applied when there was a clear legislative intent in two insurance employment statutes to preserve the confidentiality of information, including doctor’s records, submitted to the Department of Employment pertaining to the nature and cause of the claimant’s disability); *Sinacore v. Superior Court*, 81 Cal. App. 3d 223 (Cal. App. 1978) (holding that the absolute privilege applied to county welfare department records under Welf. & Inst. Code §10850, which restricts the disclosure of welfare benefit program records in civil proceedings conducted in connection with the actual administration of such programs); *Edgar v. Superior Court*, 148 Cal. Rptr. 687 (Cal. App. 1978) (finding that the absolute privilege applied to vehicle accident reports in a wrongful death case because Veh. Code §20013 states that such “reports are not permitted as evidence in any trial, civil or criminal, arising out of an accident . . .”).

that its protections are duplicative of existing statutory protections – it is extremely unlikely that submitters could successfully seek protection under §1040(b)(1).

As a result, submitters would seek protection under the conditional exception of §1040(b)(2). This exception is discretionary. It would allow the Commission to grant confidential protection for those documents that have “a need for confidentiality [that] outweighs the necessity for disclosure in the interests of justice”. The question then becomes who at the Commission will make this discretionary determination. Because Staffers may not engage in such non-ministerial decision-making, it is unclear how this protection would be granted if the Second Revised Draft G.O. 66-D is adopted.³⁴

B. SDG&E and SoCalGas Will Not Provide Privileged Documents to the Commission for Fear of Waiving the Privilege

The Second Revised Draft Resolution spends considerable time discussing documents that are protected by statute as privileged and the Commission’s proposed process for handling such documents.³⁵ The discussion reveals an apparent misunderstanding of how these legal privileges, especially the attorney-client communication privilege, is exercised by regulated utilities.³⁶

For example,³⁷ the Second Revised Draft Resolution repeatedly implies that it is the Commission’s– not the submitting party’s– decision whether to accept documents containing attorney-client communications or other privileged information.

- “If the CPUC . . . determines that it is not willing to accept the material subject to the asserted [attorney-client] privilege and related confidentiality request, the privilegeasserter could choose to withhold the records . . . ”³⁸
- “If a regulated entity provides privileged information to the CPUC in confidence . . . ”³⁹

³⁴ See *supra*, section III.C; Second Revised Draft Resolution at 66-67 (“[W]e would still need to undertake a balancing of interests for and against disclosure required for an assertion of the conditional official information privilege in Cal. Evid. Code §1040(b)(2).”).

³⁵ See, e.g., Second Revised Draft Resolution at 54-63.

³⁶ SDG&E and SoCalGas also have similar concerns about the Second Revised Draft Resolution’s expectation that utilities would provide the Commission with documents protected from public disclosure by the attorney work product privilege or the trade secret privilege.

³⁷ Second Revised Draft Resolution at 57 – 62.

³⁸ Second Revised Draft Resolution at 58.

³⁹ Second Revised Draft Resolution at 59.

- “If a privileged holder meets its burden of proof, the privileged information need not be disclosed to the CPUC.”⁴⁰
- “However, if the CPUC agrees the burden is met, the CPUC is not compelled to accept the privileged information, or to accept it subject to the privilege holder’s conditions.”⁴¹

These statements demonstrate a fundamental misunderstanding of how the attorney-client privilege (and other statutory-based privileges) functions. To clarify, the attorney-client privilege “is the oldest of the privileges for confidential communications known to the common law.”⁴² The attorney-client privilege applies to litigation and nonlitigation situations.⁴³ The attorney client privilege applies even when the “client” is a corporation, such as a utility. The Supreme Court has held that, in the corporate context, the privilege applies as long as “[t]he communications at issue were made by [company] employees to counsel for [the company] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel.”⁴⁴ Moreover, the Supreme Court has clearly recognized that “the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”⁴⁵ The privilege lasts forever unless waived.⁴⁶

Contrary to the Second Revised Draft Resolution’s assertions, it is the decision of the party asserting the privilege, not the Commission, whether or not to provide privileged documents to the Commission. Pursuant to our rights under Cal. Evid. Code §954, SDG&E and SoCalGas will assert the privilege and not provide the documents in question to the Commission for fear of waiving the privilege.⁴⁷ If the Commission demands access to the documents to determine whether the privilege applies, SDG&E and SoCalGas might allow a Commission representative to conduct an in-camera review of the document with the understanding that privilege has not

⁴⁰ Second Revised Draft Resolution at 58.

⁴¹ Second Revised Draft Resolution at 58.

⁴² *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁴³ *Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1124-25.

⁴⁴ *Upjohn*, 449 U.S. at 389, 394.

⁴⁵ *Upjohn*, 449 U.S. at 390.

⁴⁶ California Attorney General’s Office, *Summary of the California Public Records Act 2004*, at 9, available at http://ag.ca.gov/publications/summary_public_records_act.pdf (“Attorney General’s PRA Summary”).

⁴⁷ Similarly, SDG&E and SoCalGas will not provide the Commission with documents protected by the attorney work product privilege for fear of waiving the privilege. The attorney work product rule covers research, analysis, impressions and conclusions of an attorney. This confidentiality rule appears in §2018 of the Code of Civil Procedure and is incorporated into the CPRA through §6254(k). Records subject to the rule are confidential forever, unless waived. The rule applies in litigation and nonlitigation circumstances alike. *Attorney General’s PRA Summary*, at 9, citing *County of Los Angeles v. Superior Court (Axelrad II)*, 82 Cal.App.4th 819, 833 (2000).

been waived, but will not physically provide the document to the Commission for inspection or retention.⁴⁸

C. Information about Utility Employees Should Receive Confidential Treatment if its Disclosure Would Constitute an Unwarranted Invasion of Personal Privacy

The Second Revised Draft Resolution proposes the wrong legal standard and relies on an inapplicable case it states that “[w]hen we determine whether to disclose, or refrain from disclosing, personal information [of a utility employee] in our safety-related records, a primary consideration will [be] whether disclosure will shed light on a utility’s performance of its safety responsibilities.”⁴⁹

Privacy is a constitutional right and a fundamental interest recognized by the PRA.⁵⁰ SGD&E and SoCalGas take the privacy rights and interests of utility employees very seriously. California Gov. Code §6254(c) sets out the standard for protecting employee information from public disclosure by protecting from public disclosure “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Judicial interpretations of the identically-worded federal FOIA statute, 5 U.S.C.S. §552(b)(6), demonstrate that the correct standard for determining whether utility employee information may be publicly disclosed is a two-part test.

First, the Commission must determine whether the requested information constitutes “Personnel, medical, or similar files.” Courts have interpreted the ambiguous “similar files” to turn on whether or not the information is of a sufficiently personal nature, and includes consideration of

⁴⁸ *C.f.*, *U.S. v. Thomas*, 562 F.3d 387 (D.C. 2009) (discussing how a one-time disclosure of privileged information by a power company to federal investigators may not have waived the privilege based on three factors: (1) the party claiming the privilege seeks to use it in a way that is consistent with the purpose of the privilege; (2) the party had a reasonable basis for believing that the disclosed materials would be kept confidential by the government; and (3) waiver of the privilege in these circumstances would trench policy elements inherent in the privilege).

⁴⁹ Second Revised Draft Resolution at 75.

⁵⁰ Article 1, section 1 of the California Constitution; Cal. Gov. Code §§ 6254(c), 6254(k) & 6255; *New York Times Co. v. Superior Court*, 218 Cal.App.3d 1579 (1990); *see also Attorney General’s PRA Summary*, at 3 (explaining that “Although there is no general right to privacy articulated in the CPRA, the Legislature recognized the individual right to privacy in crafting a number of its exemptions.”).

whether or not disclosure would cause the person whom the information concerns special embarrassment or disgrace.⁵¹ Contrary to the Second Revised Draft Resolution's callused assertion,⁵² the professional reputation of a private individual involved in a safety-related incident may be at stake if his or her name or personal information is publicly revealed in a safety report.⁵³

Second, after determining that the information in question is within the scope of the "similar files" protection, the Commission would balance the individual's right to privacy against the PRA's objective to contribute to public understanding of the operations or activities of government to determine if disclosure of the information would constitute a clearly unwarranted invasion of privacy.⁵⁴ There are many factors to weigh as part of this balancing act. For example, if the requested "information is intimate or personal in nature and has not been provided to a government agency as part of an attempt to acquire a benefit, disclosure of the information probably would constitute a violation of the individual's privacy."⁵⁵ In addition, the utility employee document may not be disclosable for safety reasons.⁵⁶

⁵¹ Because the element shared by personnel and medical files, which are explicitly covered by the exemption set out in 5 U.S.C.S. § 552(b)(6), is the personal quality of the information, the test for determining whether or not the information is covered by the exemption as a "similar file" to personnel or medical files turns on whether or not the information is of a sufficiently personal nature, and also includes consideration of whether or not disclosure would cause the person whom the information concerns some special embarrassment. *Pacific Molasses Co. v. National Labor Relations Bd. Reg'l Office*, 577 F.2d 1172, 1179 (5th Cir. 1978); *Florida Med. Ass'n v. Department of Health, Educ. & Welfare*, 479 F. Supp. 1291, 1303-1304 (M.D. Fla. 1979). For example, in *Dep't of the Air Force v. Rose*, 425 U.S. 352, 370, 380-381 (1976), the Supreme Court held that disclosure of disciplinary records of Air Force Academy cadets implicates privacy values in that it could result in embarrassment and disgrace as well as practical disadvantages for the individuals involved. Similarly in *Pacific Molasses*, the court of appeals held that an employer's FOIA request for copies of employees' individual union authorization cards from defendant agency must be denied because the cards were exempted from the public disclosure requirements of FOIA as files similar to personnel or medical files, the disclosure of which would constitute a clearly unwarranted invasion of privacy. 577 F.2d at 1179.

⁵² "We do not believe that [] individuals [whose activities had a positive or negative effect on safety issues covered in the inspection or audit] generally have objectively reasonable expectations of privacy with regard to their identity and actions in the context of their performance of safety-related duties or their communications with the CPUC." Second Revised Draft Resolution at 15.

⁵³ See, e.g., *Lone worker caused power cut that left six million in darkness, flights grounded and traffic gridlocked in Arizona and California*, DAILY MAIL, September 10, 2011, available at <http://www.dailymail.co.uk/news/article-2035379/US-blackout-Worker-caused-power-cut-left-6m-darkness-Arizona-California.html> (noting that "For obvious reasons, APS did not name the employee.").

⁵⁴ See, e.g., *Rose*, 425 U.S. at 370, 380-381; *Department of Def. v. Federal Labor Relations Auth.*, 510 U.S. 487, 494-496 (1994).

⁵⁵ *Attorney General's PRA Summary*, at 7.

⁵⁶ For example, in *Northern Cal. Police Practices Project v. Craig*, the court held that California Highway Patrol training documents were not disclosable in response to a PRA request because the records dealt with security and safety procedures used by highway patrol. 153 Cal. Rptr. 173 (Cal. App. 1979).

Therefore, the Second Revised Draft Resolution's assertion that the Commission should base its decision to release utility employee information in response to a PRA request on the "primary consideration [of] whether disclosure will shed light on a utility's performance of its safety responsibilities" is legally incorrect.⁵⁷ Instead, the Commission must follow the two-part test to properly balance the individual's right to privacy against the public's increased understanding of government operations.

The Second Revised Draft Resolution cites to only one case, *BRV, Inc. v. Superior Court*, in support of its proposition that a utility employee's significant right to privacy can be outweighed by the public's desire for information.⁵⁸ *BRV* is inapplicable to most utility employees, however. In *BRV*, the employee at issue was a public official by nature of his job as the District Superintendent.⁵⁹ The *BRV* court found that disclosing his employee information was warranted, in large part, because of his status as a public official, which "under the *Sullivan* standard, had a significantly reduced expectation of privacy in the matters of his public employment."⁶⁰ However, the *BRV* court refused to disclose the names of the students or parents involved in the situation because, unlike the school district superintendent, those individuals were not "public officials."⁶¹ The employees of SDG&E, SoCalGas and other regulated utilities have more in common with the parents and students in *BVD* because they are not public officials.

Thus, SDG&E and SoCalGas believe that the Commission should err on protecting the personal information of utility employee information pursuant to Cal. Gov. Code §6254(c) and its two-part balancing test.

V. THE SECOND REVISED DRAFT RESOLUTION MUST BE AMENDED TO INCLUDE SPECIFIC PROCEDURAL PROTECTIONS

The Second Revised Draft Resolution fails to include certain procedural protections that SDG&E and SoCalGas requested in our April and July 2012 Joint Comments. We reassert their need here, as well as the need to discuss the Commission's intended coordination efforts with DRA.

First, it is the understanding of SDG&E and SoCalGas that for purposes of the PRA, DRA is considered to be part of the Commission. However, the Second Revised Draft Resolution lacks any discussion of if and how DRA and the Commission's PRO would work together to develop

⁵⁷ Second Revised Draft Resolution at 75

⁵⁸ Second Revised Draft Resolution at 74-75 ("Where professional competence is at issue, courts may find that even significant employee privacy interests are outweighed by other considerations.").

⁵⁹ *BRV, Inc. v. Superior Court*, 143 Cal.App.4th 742, 755 (2006) ("Because of Morris's position as a public official and the public nature of the allegations, the public's interest in disclosure outweighed Morris's interest in preventing disclosure of the Davis report. ...").

⁶⁰ See *Braun v. City of Taft*, 154 Cal. App. 3d 332, 347 (1984) (noting public officials have less of an expectation of privacy based on their stature as a public official) ("Although one does not lose his right to privacy upon accepting public employment, the very fact that he is engaged in the public's business strips him of some anonymity").

⁶¹ *BRV*, 143 Cal.App.4th at 759.

the proposed public databases and indexes. In addition, there has not been a discussion about whether DRA will require (or adopt) the Commission's process for approving requests for confidential treatment. Finally, the Second Revised Draft Resolution does not discuss how the DRA and PRO will coordinate the Commission's responses to PRA requests.

Second, the Second Revised Draft Resolution still fails to protect those documents previously labeled as "confidential" and submitted to the Commission (including DRA) from disclosure.⁶² Instead, the Second Revised Draft Resolution notes that the Commission "do[es] not intend to make public every document previously filed with the CPUC that may not be subject to confidential treatment under new matrices or polices, without providing some notice of our intentions."⁶³ This promise does not assure SDG&E and SoCalGas that the hundreds of thousands of confidential documents that have already been provided to the Commission will continue to receive confidential protection. SDG&E and SoCalGas again remind the Commission that its rulemaking may only apply prospectively, not retrospectively. Therefore, the Draft Resolution should note that any "grandfathered" documents submitted to the Commission prior to the effective date of any subsequent resolution or general order should only be subject to the relevant rules under G.O. 66-C and Pub. Util. Code §583.

Third, the Second Revised Draft Resolution fails to suggest a robust process by which submitters of confidential documents are notified of an unauthorized disclosure by the Commission so that the submitter may take the necessary steps to mitigate any resulting damage.⁶⁴ Instead, the Second Revised Draft G.O. 66-D only mentions this issue in passing when it states that regulated utilities will be required to provide the Commission with up-to-date contact information in the event that the Commission needs to "contact the person to provide appropriate notifications, including notifications of inadvertent or unauthorized disclosure . . ."⁶⁵ However, it does not include a discussion of what constitutes "appropriate notifications", when such notifications would be required, and what mitigation efforts by the Commission can be expected.

SDG&E and SoCalGas have previously proposed a process by which the Commission is required to provide the submitter of confidential information, and parties with a demonstrated interest in the information, with notice of the unauthorized disclosure as soon as such disclosure is known or suspected to have occurred. In accordance with this process, the Commission will also inform the submitter of any mitigation steps it has made upon learning of the disclosure.⁶⁶

Lastly, SDG&E and SoCalGas previously expressed their concerns that unlike utility submitters, whistleblowers would "not [be] required to provide the information required in this General

⁶² April Joint Comments at 15; July Joint Comments at 10.

⁶³ Second Revised Draft Resolution at 92.

⁶⁴ April Joint Comments at 14; July Joint Comments at 10.

⁶⁵ Second Revised Draft G.O. 66-D at 2.2.4.9.

⁶⁶ July Joint Comments at 10.

Order” when requesting confidential treatment⁶⁷ and utilities would not be able to object to the public disclosure of these confidential documents.⁶⁸ The Second Revised Draft Resolution attempts to address these concerns, but still falls short of the mark. The Second Revised Draft G.O. 66-D provides that “[i]f a whistleblower submits or proposes to submit information obtained from a utility, the utility will generally be offered an opportunity to request confidential treatment for any utility-generated information.”⁶⁹ SDG&E and SoCalGas object the non-committal language that would not require the Commission to consult with the utility and request that “generally” be stricken from the draft language.

VI. CONCLUSION

SDG&E and SoCalGas thank the Commission for its consideration of the Joint Comments of SDG&E and SoCalGas in response to Second Revised Draft Resolution L-436 and request that the Commission hold the Second Revised Draft Resolution in abeyance while it implements the suggested changes herein. Alternatively, SDG&E and SoCalGas respectfully request that the Second Revised Draft Resolution be withdrawn from any future Commission meetings for the indefinite future.

Sincerely,

/s/ Emma D. Salustro

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⁶⁷ Second Revised Draft G.O. 66-D at 3.1.3.

⁶⁸ July Joint Comments at 10-11.

⁶⁹ Second Revised Draft G.O. 66-D at 3.1.2.4 (emphasis added).

Attachment A

Proposed Process

Proposed Document Submission Process for Regulated Utilities Under Draft G.O. 66-D

Utility searches matrix/decision/statutes/G.O.s to determine if document deserves Confidential Treatment ("CT"); and completes request with short form and declaration with final determination. (See Draft G.O. 66-D, Sections 2.2.2.1, 2.2.2.3, 2.2.4)

If Privileged Document

If Request for CT

If Public Document

Send to PRO letter establishing privilege, but not actual document* (2.2.2.2)

Send to PRO

Send to PRO document labeled public*

and

Letter requesting CT (posted publicly)* (2.2.4.10)

Document (not posted publicly)* (2.2.4.10)

Who evaluates if burden is met?

Staffer determines: (3.2)

*= All submissions and initial outcomes must be included in a regulated utility's required Monthly Report. PRO uses Monthly Report to draft its PRO Resolution for Commission vote. (3.1.2.3; 3.2.2: 3.2(8))

Doc fits into matrix/statute/GO category allowing for CT (3.2(5)(b)(1))

or

Doc fits into Public category (3.2(5)(3))

or

Doc doesn't fit into any Confidential or Public categories (3.2(5)(4))

CT approved*

CT denied*

Who decides?